CHEAH HOUY LING v. PP

HIGH COURT MALAYA, PULAU PINANG
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPEAL NO: PA-42S-1-01-2021]
24 JANUARY 2022

Abstract – *Where an accused in a charge for criminal breach of trust under s. 409 of the Penal Code was alleged to have been entrusted with monies belonging to the complainant, and the evidence as adduced showed that entrustment was made not by the complainant but by a third party, then the charge was vitiated by a flaw which could not be cured by s. 422 of the Criminal Procedure Code. The prosecution evidence being inconsistent with the preferred charge, the accused was entitled to be acquitted and discharged without his defence being called.*

CRIMINAL PROCEDURE: *Charge – Defective – Accused charged for breach of trust by public servant or agent under s. 409 of Penal Code – Complainant handed cheque to accused, insurance agent, to increase premium amount payment on insurance policy – Complainant later discovered no change in policy premium payments – Accused used monies for personal use – Whether there was entrustment of monies for payment of premium – Whether prosecution stated by whom entrustment was made – Whether ingredients of offence proven – Whether charge defective – Whether accused prejudiced*

The complainant ('PW1') had bought insurance policies from the appellant, an insurance agent for Alliance Life Insurance Malaysia Bhd ('Alliance'). The appellant suggested to PW1 to increase his premium amount payment on his insurance policy and PW1 agreed. PW1 handed over to the appellant, a cheque for the amount of RM32,742, in the appellant's personal name. The cheque was then credited into the appellant's personal account. However, in 2011, when PW1 checked the status of his policies with Alliance, he discovered that there was no change in his policy premium payments. PW1 requested for the return of the monies from the appellant but the latter claimed that she did not have the monies as she had used the same to purchase a condominium. PW1 gave an opportunity to the appellant to settle the matter but, despite making promises, the appellant failed to return them. This led to PW1 filing a police report against the appellant. The appellant was charged at the Sessions Court for breach of trust by public servant or agent, an offence under s. 409 of the Penal Code ('PC'). At the conclusion of the trial, the Sessions Court Judge ('SCJ') found that the appellant's defence failed to raise any reasonable doubt on the prosecution's case. The appellant was found guilty of the offence and sentenced to six years' imprisonment. Hence, the present appeal. In support of her appeal, the appellant submitted that the SCJ erred in law and in fact in, *inter alia*,

A (i) finding that there was entrustment of the monies for the purpose of payment of the premium; (ii) accepting the uncorroborated evidence of PW1; and (iii) finding that the prosecution had proven all the ingredients of the offence under s. 409 of the PC.

Held (allowing appeal):

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(1) In framing the charge, it was obligatory on the prosecution to clearly state by whom was the entrustment made since the offence of a criminal breach of trust involves the element of entrustment by some party, who is the owner of the property. If the party named in the charge is not the owner of the property, there could not then be any offence committed by the accused against some other party who is not named. Notwithstanding that s. 409 of the PC does not provide that entrustment must be by someone, for the purpose of notifying the accused on the offence committed, the charge must describe with clarity and certainty against whose property the offence was committed. (paras 27 & 28)

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(2) The wordings of the charge clearly omitted to state that it was PW1, as the owner of the property, who made the entrustment of the cheque to the appellant. The reading of the charge gave meaning that it was Alliance who made that entrustment and not PW1. The omission constituted an error which was substantive in nature and not a mere technicality. The charge was defective. All the evidence presented by the prosecution did not prove the offence as per the charge. The appellant was plainly prejudiced when she was made to answer a case that was not premised on the charge. (paras 26, 30 & 31)

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(3) There was no evidence proving PW1's claim that the payment of the cheque was an entrustment to be applied by the appellant specifically for the payment for the additional premium. Both the prosecution and the SCJ found it sufficient to accept PW1's uncorroborated oral evidence in proving that fact. There was no reason evident as to why such a position was taken. In the absence of any documentary evidence proving that fact, PW1's oral evidence stood only as an allegation at best. Furthermore, PW1 was a witness with a purpose to serve and in accepting PW1's evidence, the SCJ should have cautioned himself of that fact and this he failed to do. There was a need for a corroborative evidence to prove entrustment. The seriousness of the offence and the prospect of a heavy sentence on the appellant if she was found guilty warranted the trial court to evaluate PW1's uncorroborated evidence with equal caution. (paras 35 & 42)

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(4) The prosecution failed to prove a *prima facie* case at the of the prosecution's case. The appellant should not have been ordered to enter her defence to the charge. The conviction and sentence by the Sessions Court were set aside. (paras 44 & 45)

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Case(s) referred to:
Aisyah Mohd Rose & Anor v. PP [2016] 1 CLJ 529 CA ***(refd)***
Jamil Dun v. PP [2019] 1 LNS 191 CA ***(refd)***
Jeswantrai v. State of Bambay [1956] AIR SC 575 ***(refd)***
Lim Boon San v. PP [1967] 1 LNS 86 HC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Muhammad Lukman Mohamad v. PP [2021] 7 CLJ 524 FC ***(refd)***
PP v. Chung Tshun Tin & Ors [2007] 10 CLJ 527 HC ***(refd)***
PP v. Margarita B Cruz [1987] 1 LNS 129 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Wong Kar Juat & Anor [2016] 1 LNS 1341 HC ***(refd)***
PP v. Yeoh Teck Chye [1981] 1 LNS 93 FC ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
RK Dalmia v. The Delhi Administrator AIR 1962 SC 1821 ***(refd)***
Sathiadas v. PP [1970] 1 LNS 142 HC ***(refd)***
Shawal Hj Mohd Yassin v. PP [2006] 6 CLJ 392 HC ***(refd)***
Som Nath v. State of Rajasthan [1972] AIR SC 1490 ***(refd)***
Tan Kim Ho & Anor v. PP & Anor [2009] 3 CLJ 236 FC ***(refd)***
Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yap Ee Kong & Anor v. PP [1980] 1 LNS 117 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Evidence Act 1950, ss. 103, 106
Penal Code, s. 409

Other source(s) referred to:
Colinvaux's Law of Insurance, 10th edn, p 30

For the appellant - Gopal Sri Ram, Yasmin Soh & Peter Siew; M/s Siew, Khairul & Co
For the respondent - Muna Mohamed Jaffar; DPP

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Matter Before This Court

[1] This is an appeal by the appellant against both conviction and sentence ('appeal'). The appellant was charged for an offence under s. 409 of the Penal Code ('Act'). At the conclusion of the trial, the learned Sessions Court Judge ('SCJ') held that the prosecution had proven its case beyond reasonable doubt against the appellant and the appellant had failed to raise a reasonable doubt in the prosecution's case. The appellant was found guilty of the offence as charged and was sentenced to six years imprisonment from the date of conviction. Pending hearing of the appeal execution of the sentence was stayed.

[2] The charge ("charge") against the appellant read as follows:

> Bahawa kamu pada 9 September 2010 sebagai ejen yang digaji oleh Alliance Life Insurance Malaysia Berhad di alamat Level 27, Menara BHL S1, Jalan Sultan Ahmad Shah, 10050 Pulau Pinang dan dalam kapasiti tersebut telah diamanahkan dengan suatu harta iaitu cek nombor 31093 berjumlah RM32,742.00 sebagai bayaran polisi insurans, telah melakukan pecah amanah jenayah berkaitan harta tersebut, dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

The Prosecution Case

[3] A total of eight witnesses were called for the prosecution including the complainant, Khaw Keng Hong (PW1), Mohd Jafri bin Abu Bakar (Assistant Manager, Malayan Banking Berhad, PW2), Burhanudddin bin Hassan Basri (CIMB Bank Berhad, PW3), Tan Kung Hung (Head of Sales Operation, Alliance Life Insurance Malaysia Berhad, PW4), Tan Ee Ming (Northern Branch Manager, Alliance Life Insurance Malaysia Berhad, PW6), ASP Adianto bin Mudin (initial investigating officer, PW7) and Inspector Izan Farhanie binti Zakaria (substitute investigating officer, PW8).

[4] At the material time, the appellant was an insurance agent for Alliance Life Insurance Malaysia Berhad ('Alliance'). PW1 was the appellant's client since 2003. PW1 also bought insurance policies for his wife and children through the appellant. Some time on 9 September 2010, PW1 stated that the appellant had suggested to him to increase his premium amount payment on his insurance policy so that he could enjoy higher dividends and have a shorter maturity period for his policy.

[5] PW1 agreed to that suggestion and handed over to the appellant a CIMB cheque no. 31093 dated 9 September 2010 for the amount of RM32,742 ('cheque'). The cheque (exh. P2) was made out in the appellant's personal name at the request of the appellant for the sole purpose of paying the additional premium. The appellant was entrusted with the amount of RM32,742 to enable the appellant to make the premium payment on behalf of PW1 to Alliance.

[6] The cheque was credited into the appellant's personal account number 507031052865 at Malayan Banking Berhad on 13 September 2010 (exh. P5). That account was operated jointly with the appellant's sister, Cheah Houy Cheng ('account').

[7] Sometime in 2011, PW1 checked the status of his policies with Alliance and discovered that there was no change in his policy premium payments and that the appellant had not made any payment for the additional premium to Alliance. PW1 then met the appellant seeking an explanation on the matter and requested for a return of the monies. According to PW1, the

appellant informed him that she did not have the monies to return to PW1 and that she had used his monies to purchase a condominium at Straits Quay, Penang.

[8] PW1 then gave opportunity to the appellant to settle the matter and according to PW1 despite promises she failed to return the monies to PW1. Eventually, PW1 proceeded to file a police report against the appellant on 12 March 2014 (exh. P3).

Grounds Of Judgment Of The Sessions Court

[9] In arriving at his decision in finding that the prosecution had established a *prima facie* case at the end of the prosecution case the learned SCJ had accepted the evidence of the prosecution, *inter alia*, that (i) at the material time the appellant was an agent for Alliance; (ii) PW1 was a client of the appellant and that he in fact had entrusted with the appellant the amount of RM32,742 made *via* the cheque; (iii) the entrustment was for the payment for additional premium to Alliance and the payment was to be forwarded to Alliance by the appellant; (iv) the cheque was credited into the account; (v) it was not disputed by the appellant that the cheque was paid to the appellant and credited into the account; (vi) there was no payment made by the appellant to Alliance in the amount of RM32,742 for additional premiums for PW1's insurance policy; (vii) there was no specific challenge by the appellant on the entrustment and purpose of payment of the cheque; and (viii) there were efforts towards settlement of PW1's claim by the appellant which pointed towards the fact that there was a misuse of the monies entrusted by PW1 and a breach of trust.

[10] At the conclusion of the trial, the learned SCJ found that the appellant had failed to raise any reasonable doubt in the prosecution's case based upon the consideration, *inter alia*, that: (i) the appellant's version of the actual purpose of the issuance of the cheque by PW1 and its particulars as appearing at para. 17 of her witness statement (exh. PSD1) were never put to the prosecution witnesses at the prosecution stage and therefore constituted an after-thought defence; (ii) the alleged threats by PW1 against the appellant as described in paras. 19-21 of exh. PSD1 were not put to PW1 at the prosecution stage and also amounted to an after-thought defence; and (iii) the testimonies of SD2 to SW7 who did not have any personal knowledge of what had transpired between PW1 and the appellant carried no weight in supporting the appellant's case; and (iv) the appellant failed to raise any reasonable doubt on the prosecution case.

The Appeal

Grounds Of Appeal

[11] The appellant's ground of appeal appears in the amended petition of appeal, *inter alia*:

(i) that the learned SCJ erred in law and in fact in finding the appellant guilty of the offence under the charge;

(ii) that the learned SCJ erred in law and in fact in finding that there was entrustment of the monies for the purpose of payment of premium;

(iii) that the learned SCJ erred in law and in fact when he accepted the uncorroborated evidence of PW1;

(iv) that the learned SCJ erred in law and in fact when he found that the prosecution had proven all the ingredients of the offence under s. 409 of the Act;

(v) that the learned SCJ erred in law and in fact when held that the appellant's defence was an afterthought;

(vi) that the learned SCJ erred in law and in fact in passing a sentence of six years imprisonment on the appellant which was excessive; and

(vii) that the learned SCJ erred in law and in fact by failing to adequately consider mitigating factors in favour of the appellant in passing sentence.

The Law Relating To Appeals

[12] In the case of *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875 Mohd Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ...We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
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> (f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

[13] It is trite law as set out by the Supreme Court in the case of *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200B that the appellate court should be slow to interfere with a sentence passed by the court below unless it is manifestly wrong. Later in the case of *Jamil Dun v. PP* [2019] 1 LNS 191; [2019] MLJU 179, the Court of Appeal held as follows:

[19] It is trite that an appellate court will be slow to interfere with the sentence imposed by the court below unless (a) the sentence imposed was manifestly excessive or inadequate; (b) that the sentence passed was wrong in the sense of being illegal or unsuitable to the proved facts and circumstances of the case; or (c) there was an error or misdirection in considering the facts and circumstances of the case. An appellate court will not interfere with the sentence merely because it might have passed a different sentence: see *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83.

Hearing Of The Appeal

Submissions By The Appellant

[14] At the hearing of the appeal, the appellant presented four main issues for this court's consideration: that (i) the prosecution failed to prove its case based on the charge; (ii) the element of entrustment by PW1 to the appellant was not proven; (iii) PW1 was a witness with a purpose to serve and as such his uncorroborated evidence should have been treated with caution by the learned SCJ; and (iv) PW1 was an accomplice in the alleged criminal breach of trust and therefore his evidence should have been evaluated as one.

[15] On the first issue, it was submitted that the charge did not disclose any entrustment by PW1 as the complainant. The reading of the charge expressly showed that the entrustment was made by Alliance and not by PW1. Thus, there was an error on the charge and not consistent with the evidence presented during the trial. That error was not curable under s. 422 of the Criminal Procedure Code and on that ground the charge against the appellant should have been dismissed. Reference was made to the decision in *PP v. Yeoh Teck Chye* [1981] 1 LNS 93; [1981] 2 MLJ 176 which held that for a person to be convicted on the offence of criminal breach of trust entrustment of the property must be proved as one of the ingredients of the offence:

Harking back to first principles, for a person to be guilty of the offence of criminal breach of trust he should be

(i) entrusted with property or dominion over the property;

(ii)(a) that he should dishonestly misappropriate or convert it to his own use OR

A (b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of

(iii)(a) any direction of law prescribing the manner in which such trust is to be discharged OR

(b) of any legal contract made touching the discharge of such trust.

B **[16]** On the second issue, it was submitted there is no documentary evidence apart from PW1's claim that the cheque was issued for the purpose of payment of the additional premium and entrusted with the appellant. There was no investigation done by PW7 and PW8 to determine the truth of PW1's claim. There was no documentary evidence to show that PW1 had C agreed to any additional premium, how the calculation of RM32,742 as additional premium was arrived at and that Alliance had agreed to the increase in the insurance premium payments. Reference was made to *Colinvaux's Law of Insurance*, 10th edn, p. 30 where the authors stated that it is a step in the making of a contract of insurance that a proposal will be given D containing particulars of the proposed insurance and terms.

[17] On the third issue it was submitted that by PW1's own testimony he made the police report against the appellant because it would have been expensive to pursue the claim for recovery of the amount *via* a civil suit. This showed that PW1 was a witness who had a purpose to serve. PW1's primary E objective was to recover the money and since there was no documentary evidence to corroborate PW1's oral evidence on the entrustment of the RM32,742, the learned SCJ should have treated PW1's evidence with caution. Reference was made to the decisions in *Lim Boon San v. PP* [1967] 1 LNS 86; [1968] 2 MLJ 45 and *Tengku Mahmood v. PP* [1974] 1 LNS 176; F [1974] 1 MLJ 110. In *Lim Boon San v. PP* (*supra*) Raja Azlan Shah J (as he then was) held:

> At the very highest, I consider him as a witness having a purpose to serve, and therefore the warning against uncorroborated evidence should be given. However, in the final analysis, the rule being only a rule of practice, G each case must be looked at in the light of its own facts and that, if there be clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction, the court will not interfere: (see *R Prater* [1960] 1 All ER 298; *R Stannard* [1964] 1 All ER 34).

H **[18]** In *Tengku Mahmood v. PP* (*supra*), Raja Azlan Shah FCJ held:

> Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touchstone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive. Although in cases of this I kind it is not easy to get satisfactory evidence, one must not also lose sight of the fact that at the same time it is indeed easy to 'fix' a man in

the position of the appellant. A man who was not successful before the Public Services Commission may have hurt his pride and hurt pride is a ferocious beast. It is for this reason that a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot, in justice, be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh. Further, the graver the issue involved, and particularly when an allegation of corruption is in the air, the greater is the necessity for the appellate court to enquire whether the conclusion as to credibility is one that must under the law be regarded as, for all practical purposes, irrefragable.

[19] On the fourth issue, it was submitted that PW1 testified he had told the appellant if she did not pay back his monies PW1 would then make a police report against her. Since PW1 believed that the appellant had committed a breach of trust, then by making that statement to the appellant PW1 was attempting to obtain a restitution of property for himself in consideration of him concealing the offence. That amounted to an offence under s. 213 of the Penal Code and also made PW1 an accomplice to the offence of criminal breach of trust. Since PW1 became an accomplice, then the learned SCJ should have directed his mind to evaluate the evidence of PW1 and find that corroboration is required under the circumstances. Reference was made to the decision in *Yap Ee Kong v. PP & Anor* [1980] 1 LNS 117; [1981] 1 MLJ 144 where the Federal Court held:

Another aspect of the law relating to accomplice's evidence is whether corroboration is at all necessary where the evidence of the accomplice is itself uninspiring and unacceptable. From the facts of the present case it can be seen from the records that in so far as the offence against the first appellant, Yap Ee Kong, is concerned, there is absolutely no evidence against him. In such a situation the principles enunciated by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v. Hester* [1973] AC 296, 315 should be applied: "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said ... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence." Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring, and unacceptable then corroboration would be futile and unnecessary.

[20] Based on those issues learned counsel for the appellant argued that the prosecution had failed to prove a *prima facie* case against the appellant and the learned SCJ should not have ordered the appellant to enter her defence.

Submissions By The Respondent

[21] In response to the issues raised, learned Deputy Public Prosecutor submitted that notwithstanding the charge may have contained an error in describing the ingredient of entrustment, that error did not cause any prejudice to the appellant. The appellant was adequately notified *via* the charge that she was charged with an offence under s. 409 of the Penal Code, thus, she was not misled by that error. Reference was made to the Federal Court decision in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509 where it was held:

> [27] Pursuant to s. 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice' (*Yap Sing Hock & Anor v. Public Prosecutor* [1992] 2 MLJ 714 at p 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).
>
> [28] It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and/or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice.

[22] It was further submitted that the evidence of PW1, PW2, PW3, PW4 and PW6 had clearly established that there was entrustment of the cheque by PW1 with the appellant, the cheque was credited into the account and there was no payment for the additional premium to Alliance on behalf of PW1. Reference was made to the decisions in *Jeswantrai v. State of Bambay* [1956] AIR SC 575 and *Som Nath v. State of Rajasthan* [1972] AIR SC 1490. In the Court of Appeal decision in *Aisyah Mohd Rose & Anor v. PP* [2016] 1 CLJ 529; [2016] 1 MLJ 840 where it was held:

[35] To bring home the charge of criminal breach of trust, the prosecution must prove that the first appellant was entrusted with the cheques or that the first appellant had dominion over the cheques. The gist of the offence is, that there is dishonest misappropriation or conversion to one's own use or that there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged (see *Sathiadas v. Public Prosecutor* [1970] 2 MLJ 241).

...

[37] ... in our view 'in any manner entrusted' is wide enough to encompass not only the property being directly entrusted by the owner to the accused but also property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank.

[38] We find support in the case of *Som Narth Puri v. The State of Rajasthan* 1972 AIR (SC) 1490 which states:

> Section 405 Penal Code merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words 'in any manner' in the context are significant. The section does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression 'entrusted' in section 409 is used in a wide sense and includes all cases in which a property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession had been handed over ...

[23] Since the appellant did not apply the entrusted monies in accordance with the specific purpose of the entrustment, then the offence was committed. There was dishonest intention by the appellant. In proving its case against the appellant, the prosecution was not obligated to prove how the monies were misappropriated by the appellant. Reference was made to *Sathiadas v. PP* [1970] 1 LNS 142; [1970] 2 MLJ 243 where it was held:

> Once the prosecution have proved that the appellant was entrusted with money for a specific purpose and that he has failed to account for it or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance within his own knowledge which is consistent with his own innocence. It must be stated here that for the purpose of establishing dishonest intention the prosecution is not required to eliminate all

A possible defences and circumstances which might exonerate the appellant, or that apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it.

B **[24]** It was further submitted that the learned SCJ was correct in finding that there was no specific challenge on PW1 on the entrustment and purpose of entrustment. Although it was put to PW1 by the defence that the amount of RM32,742 was paid to the appellant to assist PW1 in the payment of utilities (see p. 41, vol. 2 Record of Appeal), yet no particulars of the utilities C were produced. Therefore, PW1's evidence on the fact of entrustment and its purpose must be accepted as true. To take it further, none of the matters raised by the appellant in her evidence regarding the details of what the payment of RM32,742 was for was not put to PW1 at the prosecution stage and this amounted to an afterthought and rightly rejected by the trial court.

D **[25]** The totality of the evidence of all the witnesses for the defence did not in any way raise any doubt on the prosecution's case and therefore the learned SCJ was correct in his finding at the end of the trial that the prosecution had proven its case against the appellant beyond a reasonable doubt.

E **Deliberations By This Court**

Whether There Was An Error In The Charge

[26] The wordings of the charge clearly omitted to state that it was PW1 who made the entrustment of the cheque to the appellant. The reading of the F charge gave meaning that it was Alliance who made that entrustment and not PW1. It would be relevant at this juncture to refer to the decision in *PP v. Chung Tshun Tin & Ors* [2007] 10 CLJ 527; [2008] 1 MLJ 559 where it was held:

It is a fundamental principle of criminal law that the accused should be G informed with certainty and accuracy, the exact nature of the charge brought against him, otherwise he may be severely prejudiced in his defence. He can be convicted only on proof of particular offence so specified. For this purpose, the judge cannot go beyond the exact wording of the charge in finding the accused guilty. In *Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121, the Federal Court stated that the omission H to make any reference in the charge to the knowledge of the second appellant that the first appellant had a pistol did not render the charge against the second appellant defective. Knowledge is a matter of inference and unless it is clear that the law requires knowledge to be stated in the charge, its omission did not render the charge defective. In *Osman bin Abdullah v. Public Prosecutor* [1958] MLJ 12, it was stated that in a case of I murder, the interests of justice clearly requires that the accused person

should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the same time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this is not made clear, the particulars stated in the charge 'do not give the accused sufficient notice of the matter with which he is charged'.

...

In *Tan Peng Ann v. Public Prosecutor* [1949] MLJ Supp 10, the appellant was convicted on two charges of cheating and dishonestly inducing the delivery of property in contravention of s. 420 of the Penal Code in the charges, no particulars were alleged of the way in which the appellant deceived the complainants. The court stated that in framing such a charge, it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which had been practised.

[27] Reverting to the charge, in this court's view, in framing the charge it was obligatory on the prosecution to clearly state by whom was the entrustment made since the offence of a criminal breach of trust involves the element of entrustment by some party who is the owner of the property. If the party named in the charge is not the owner of the property then there cannot be any offence committed by the accused against some other party who is not named. As stated in the case of *Jeswantri v. State of Bombay* (*supra*):

For an offence under section 409, Penal Code, the first essential ingredient to be proved is that the property was entrusted, But when section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of trust with all the technicalities of the law of trust. It contemplates the creation of relationship whereby the owner of the property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of certain event ...

[28] Notwithstanding that s. 409 of the Act does not provide that the entrustment must be by someone (see *Som Narth Puri v. The State of Rajasthan* (*supra*)), yet for the purposes of notifying the accused on the offence committed, the charge must describe with clarity and certainty against whose property the offence was committed. In this court's view the fact of the entrustment must not only refer to the property but also the owner of the property. In *PP v. Wong Kar Juat & Anor* [2016] 1 LNS 1341; [2016] MLJU 698, the court held:

In my considered view, the expression "entrusted" is the material element to be proved in every offence of criminal breach of trust in which it connotes the person handing over the property to the next person who accepted the transfer of the property, remains to have control over the

property and known as the legal owner. In the case of *Puspa Kumar Rai v. State of Sikkim* [1978] Cri LJ 1379, it further explains the meaning of entrustment as follows:

> The exact connotation of the expression "entrustment" as used in Sections 405 to 409 of the I.P.C. has by now been settled by several decisions of the Supreme Court. In *Jaswantrai Manilal v. State of Bombay* it has been observed by the Supreme Court (at p. 582) (of AIR): (at p. 1123 of Cri LJ) that "entrustment contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party." In State of *Gujarat v. Jaswantlal Nathalal* it has again been observed by the Supreme Court (at p. 701) (of AIR): (at p. 805 of Cri LJ) that "the expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner". (emphasis added)

[29] Thus it fell on the shoulders of the trial court in this case to determine if the charge had sufficiently contained the ingredients of the offence. As held in *PP v. Margarita B Cruz* [1987] 1 LNS 129; [1988] 1 MLJ 539:

> I have time and again exhorted DPPs and magistrates to read the provision in the Act which creates the offence especially in regard to unfamiliar charges, and to scrutinise the charge with which the accused is charged. This charge under the Passport Act is not the sort of charge that comes up often and it is with precisely this sort of charge that the magistrate should have called for the statute from the prosecuting officer or from the library to check the provision under which the charge was made. If the law is not read, how would the magistrate then be able to find out the essential ingredients which constitute the charge? And if a magistrate does not know what the ingredients of the charge are, how is he or she able to explain the charge to the accused? It behoves all magistrates and presidents to scrutinise the charges, to read the provision of the statute under which the charge is framed, to understand the constituent ingredients of the charge, to know the nature of the punishment and appreciate the gravity of the charge. If the charge is defective or badly framed, the magistrate should point out the defects and request the prosecuting officer to amend the charge as the accused should truly understand the nature of the charge he is asked to plead to (see *Lim Beh v. Opium Farmer* (1808?84) 3 Ky 10; *Jagar Singh v. Public Prosecutor* [1936] MLJ 114).
>
> Prosecuting officers and magistrates should also heed the advice of Thomson J. (as he then was) in the case of *Public Prosecutor v. Syed Bakri* [1955] MLJ xvii as to how a charge should be framed. (See also *Public Prosecutor v. Lim Yoo Hock* [1984] 1 MLJ 309.)

[30] After considering the arguments presented on this issue, this court agrees with the contention of the appellant that the charge as framed did not show there was an offence committed *vis-a-vis* the complainant in this appeal that is PW1. There was an omission to state that the entrustment was made by PW1 as the owner of the property. The omission constituted an error which is substantive in nature and not merely a technicality as it disclosed an offence purportedly committed arising from an entrustment by Alliance and not PW1. This court finds support for this view in the decision in Azhar Mohamed J (as he then was) in *Shawal Hj Mohd Yassin v. PP* [2006] 6 CLJ 392; [2006] 4 MLJ 334.

> [12] ... In my view s. 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s. 156 In the same way, the application of s. 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s. 422 ...
>
> [13] The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant, in my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[31] For those reasons, this court holds the view that the learned SCJ had failed to direct his mind to the charge and whether the prosecution had proven its case based on that charge. There was a material omission and error that caused the charge to be defective. All the evidence presented by the prosecution did not prove the offence as per the charge. The appellant was plainly prejudiced when she was made to answer a case that was not premised on the charge.

A *Whether There Was Entrustment And PW1's Evidence*

[32] It is a requirement under s. 409 of the Act that in proving the offence, there must be entrustment of the property by the owner of the property. Without entrustment of the property any prosecution of an offence for criminal breach of trust must fail.

B

[33] It is the contention of the appellant that the prosecution had failed to prove the entrustment of the monies and that the entrustment was for the specific purpose of paying the additional insurance premium. After reviewing the evidence of the prosecution and the findings of the trial court, this court finds that apart from the oral testimony of PW1 on the entrustment and purpose of entrustment, there was no documentary evidence which proved that fact.

C

[34] The need for proof of a fact which is an element of an offence is consistent with the requirement of ss. 103 and 106 of the Evidence Act 1950:

D

Section 103

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

E

Section 106

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[35] After carefully perusing the evidence of PW1, PW6, PW7 and PW8, this court does not find that there is evidence proving PW1's claim that the payment of the cheque was an entrustment to be applied by the appellant specifically for the payment for the additional premium. It would appear that both the prosecution and the learned SCJ found it sufficient to accept PW1's uncorroborated oral evidence in proving that fact. There was no reason evident neither in the notes of proceedings nor the learned SCJ's grounds of judgment why such a position was taken. In this court's view, in absence of any documentary evidence proving that fact, PW1's oral evidence stood only as an allegation at best.

F

G

[36] This court takes judicial notice that in any insurance contract when a client desires to increase his premium, then the insurance agent would normally submit a proposal to the client showing the increased premium payment commitments, the value of dividends and the cash value of the insurance upon maturity. That proposal would serve as the information upon which the client then makes the application to the insurance company through the agent. No such proposal was produced as evidence. Further, there is no evidence to show how the increase of annual premium from RM12,992 to RM32,742 was calculated to support PW1's claim that the amount of RM32,742 constituted payment for additional premium.

H

I

[37] In addition to that PW7 had agreed that in his investigation he did not find any evidence to prove the purpose of the payment of the cheque as claimed by PW1. PW8 equally testified that apart from what PW1 said, there was no evidence to prove the purpose of the payment of the cheque. At the close of his cross-examination, PW1 did not agree that his testimony was not true and that there was no documentary evidence to support his claim. Thus, in this court's view the prosecution was challenged on the issue of proving the purpose of entrustment, yet no documentary evidence was adduced. If such documentary evidence was not available for some reason, then it was the duty of the prosecution to elicit an explanation from PW1 on the issue and why his sole oral testimony on the matter must be accepted as being the truth. That was not done by the prosecution and that caused a gap in the prosecution's case.

[38] Given the background of PW1 as a highly educated individual who possesses a Doctor of Philosophy Degree from University of London, he would have made necessary enquiries on the benefits of increasing his premium payments based on a properly issued proposal from the appellant before making such a commitment. PW1 testified that he was unsure of his financial ability to meet such payment commitments since he was already above 50 years of age (at p. 14, notes of proceedings, vol. 2 of the Record of Appeal) and that would have certainly required him to properly evaluate the proposal before finally deciding on it. Therefore, the absence of any documentary evidence proving the proposal should have raised a doubt in the learned SCJ's mind on whether there was such a suggestion from the appellant and that the cheque was indeed issued for that purpose.

[39] Learned Deputy Public Prosecutor sought to argue that since the appellant had failed to specifically challenge PW1's evidence on the entrustment and its purpose, then that evidence must be accepted as sufficiently proving the element of the offence. Reliance was made on the decisions in *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 and *Tan Kim Ho v. PP & Anor* [2009] 3 CLJ 236). In this court's view such challenge was made by the appellant as appearing at pp. 40 to 41 of the Notes of Proceedings, vol. 2 of the Record of Appeal when it was put to PW1 that the cheque was issued for the appellant to assist PW1 in paying certain utilities. In this court's view even if such challenge was weak or incredible, the prosecution's burden in proving its case against the appellant was not in any way mitigated. The element of entrustment must be proved based on the prosecution's own evidence and not by relying on some weakness in the appellant's case. As decided by the Federal Court in *Muhammad Lukman Mohamad v. PP* [2021] 7 CLJ 524; [2021] 4 MLJ 494:

Third, well-entrenched in jurisprudence is the principle that the burden is on the prosecution to prove beyond reasonable doubt of every essential fact necessary to constitute the crime with which he or she is charged (see *Nagappan a/l Kuppusamy v. Public Prosecutor* [1988] 2 MLJ 53). This principle is a cornerstone in our criminal law. The prosecution must rely on the strength of its own evidence and not relying on the weakness of the defence (see *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169; *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705).

Whether PW1's Evidence Required Corroboration

[40] After considering the arguments of learned counsel for the appellant, this court agrees that on the evidence presented in this case, PW1 was a witness who had a purpose to serve as. It was evident at pp. 33 to 34 and 38 to 39 of the Notes of Proceedings, vol. 2 of the Record of Appeal that PW1 was primarily motivated to secure a repayment of his monies from the appellant. At pp. 38 to 39, PW1 stated as follows:

P/bela: Boleh terangkan kenapa tak ada ambil civil action terhadap OKT?

A: The amount is RM32k, the lawyer cost is too much. It doesn't make sense.

P/bela: Jadi isu sekarang adalah isu peguam yang mahal?

A: Of course

P/bela: You got nothing at the end?

A: I have to pay more, expensive

P/bela: Doktor Khaw tidak mahu kes sivil sebab kos yang mahal. Sekarang ini Doktor Khaw mahukan duit semula RM32k, setuju atau tidak? At this stage adakah Doktor Khaw berpendapat duit RM32k itu tak dapat tak apa

A: Tak setuju

[41] Earlier at p. 33 of the Notes of Proceedings, vol. 2 of the Record of Appeal PW1 stated:

P/bela: Kenapa pada masa itu tak buat police report terus?

A: I don't want to blame her. To me I told her must pay it immediately. So she told me to do whatever I want, I do whatever I want. I hope you aware think about it and come back to me before I make the police report. I give her some times because I don't want to destroy young people. To me if you pay back the money, that's it. I just want my money back. That's all but she did not back to me until I fed up.

[42] It should have been clear to the learned SCJ that PW1 was a witness with a purpose to serve and in accepting PW1's evidence the learned SCJ should have cautioned himself of the fact that and this he failed to do. In this court's view, there was a justification and need for a corroborative evidence to prove the entrustment. Even if PW1 was not to be considered as a witness with purpose or an accomplice whose evidence must be treated with caution, the seriousness of the offence and the prospect of a heavy sentence on the appellant if she was found guilty warranted the trial court to evaluate PW1's uncorroborated evidence with equal caution.

Conclusion

[43] In this court's view, the learned SCJ had failed to fully appraise the facts and evidence presented by the prosecution. This court does not agree with the finding of the learned SCJ that the element of entrustment was proven by the prosecution by merely relying upon the uncorroborated oral evidence of PW1. The learned SCJ was also in error when he found that there was no specific challenge by the appellant on the matter. The facts that the cheque was credited into the appellant's account and that the monies were applied by the appellant for some purpose were not sufficient as facts proving the entrustment. The appellant may have been guilty of some other act but not for committing breach of trust arising from an entrustment by PW1. As held by the Supreme Court of India in *RK Dalmia v. The Delhi Administrator* AIR 1962 SC 1821:

> A person may be an agent or another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of section 409 I.P.C if any breach of trust is committed by that person.

[44] After carefully evaluating all the arguments presented by the appellant and the respondent, the evidence and the findings of the learned SCJ, this court finds that the prosecution had failed to prove a *prima facie* case at the end of the prosecution case. The appellant should not have been ordered to enter her defence to the charge.

Decision

[45] The appeal against both conviction and sentence is hereby allowed. The conviction and sentence as ordered by the Sessions Court are hereby set aside. Bail in the amount of RM18,000 is hereby ordered to be returned to the appellant.